IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1143

RAY MARSHALL, SECRETARY OF LABOR, ET AL.,
Appellants,

vs.

BARLOW'S, INC.,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO.

AMICUS CURIAE BRIEF OF AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF APPELLEE.

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The American Farm Bureau Federation hereby respectfully submits this amicus curiae brief. Pursuant to Supreme Court Rule 42, this brief is filed with the written consent of all parties, which consent has been filed with the Clerk of this Court.

INTEREST OF AMICUS CURIAE.

The American Farm Bureau Federation (hereinafter referred to as "Farm Bureau") of 225 Touhy Avenue, Park Ridge, Illinois 60068, is the world's largest voluntary general farm organization, representing more than two and one-half million

member families in all the states (except Alaska) and Puerto Rico. Farm Bureau was organized in 1919 under the "General Not For Profit Corporation Act" of Illinois for the purpose of promoting, protecting and representing the business, economic, social and educational interests of farmers and ranchers in the United States.

The interest of Farm Bureau in this case emanates from the effect of the inspection provisions of the Occupational Safety and Health Act of 1970, 29 U. S. C. 657(a), on Farm Bureau members in Idaho and throughout the country. Well over a majority of all farm and ranch operators maintain their private homes as part of the agricultural premises which may be subject to inspection and regulation under the Act.

Farm Bureau and its members desire to preserve the Fourth Amendment constitutional right to be secure against unreasonable searches and seizures.

NATURE OF THE CASE.

This case challenges the constitutionality of Section 8(a) of the Occupational Safety and Health Act, 29 U. S. C. 657(a), which authorizes the Secretary of Labor to conduct inspections of workplaces. The Act, 29 U. S. C. 651 *et seq.*, regulates virtually all businesses affecting commerce for the purpose of promoting safety and health.

On December 30, 1976, a three-judge federal district court in Boise, Idaho declared Section 8(a) of the Occupational Safety and Health Act unconstitutional and enjoined the Secretary from conducting inspections under such Section. *Barlow's, Inc.* v. *Usery*, 424 F. Supp. 437. On January 25, 1977, the United States Supreme Court, by order of Justice Rehnquist, stayed the three-judge court order to the extent that the order restrained the Secretary's conduct outside of the District of Idaho. On February 3, 1977, this Court, by opinion and order

of Justice Rehnquist, further stayed the three-judge order to the extent that the order affects persons other than the appellee. This Court noted Probable Jurisdiction on April 18, 1977.

ARGUMENT.

Section 8(a) of the Occupational Safety and Health Act Is Unconstitutional as Being Violative of the Fourth Amendment to the U. S. Constitution by Authorizing Warrantless Inspections of an Employer's Property.

A. The Decisions of the Court and Other Federal Precedent Preclude Warrantless Inspections of Work Premises Under the Occupational Safety and Health Act.

Section 8(a) of the Occupational Safety and Health Act (OSHA), 29 U. S. C. 657(a), provides that the Secretary of Labor may "enter without delay" for the purpose of conducting health and safety inspections under the Act. 29 U. S. C. 657(a) provides:

> "(a) In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized
>
> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
>
> (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee."

The provision does not require the Secretary to first obtain a search warrant based on probable cause or to explain that

a search need not be conducted over the objection of the party being inspected.[1]

This Court has held in two instances that an objected-to search of property for the purpose of enforcing health and safety measures without a search warrant violates the Fourth Amendment to the U. S. Constitution.[2] *Camara* v. *Municipal Court*, 387 U. S. 523; *See* v. *City of Seattle*, 387 U. S. 541.

1. U. S. Department of Labor, Occupational Safety and Health Administration, *Field Operations Manual*, Chapter V, Section D.1.c.(1) and (2), CCH Employment Safety and Health Guide ¶ 4330.4 (1976) provides:

"c. Refusal to permit inspection.

(1) General.

Section 8 of the Act provides that CSHO's may enter without delay and at reasonable times any establishment covered under the Act for the purpose of inspecting with reference to safety and health standards issued under the Act.

(2) Refused entry or inspection.

When a CSHO encounters a refusal to permit entry upon presenting proper credentials or an employer allows him to enter but refuses to permit an inspection, the CSHO should tactfully advise the employer that the Act (Section 8(a)) provides for an inspection and should endeavor to ascertain the reason for such refusal. If the employer persists in his refusal the CSHO shall advise him as follows: 'Due to your refusal to comply with Section 8(a) of the Occupational Safety and Health Act of 1970 I will be compelled to seek appropriate legal process to order your compliance.' The CSHO will then leave the premises and immediately report to the Area Director, who shall immediately consult with the Assistant Regional Director and the Regional Solicitor, who shall promptly take appropriate action."

2. The Fourth Amendment to the U. S. Constitution provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Affirmed in *Air Pollution Variance Board* v. *Western Alfalfa Corporation*, 416 U. S. 861. The factual circumstances in *Camara*, *supra*, and *See*, *supra*, are not significantly different from those in this case: (1) Residential or business property alike is being subjected to government inspection without compliance with a warrant procedure to protect legitimate security and privacy interests; (2) probable cause that there has occurred a violation of law is not present; and (3) failure to permit inspection subjects the resident or businessman to being convicted of a crime or held in contempt of court.

In commenting on the warrantless inspection system in *Camara*, *supra*, 387 U. S. at 532-533, Justice White, writing for the majority, stated: "The practical effect of this system is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search."

The privacy and security interests protected in *Camara*, *supra*, and *See*, *supra*, are of equal or greater importance to the well-being of the millions of farmers, ranchers and other employers[3] who are faced with the warrantless inspection system of OSHA. In the case of agricultural operations, the farm or ranch operator has traditionally maintained a private residence on the agricultural premises.[4] In such instances, the

3. OSHA applies to over 6 million workplaces. See *Barlow's, Inc.* v. *Usery*, 424 F. Supp. 437 at 440.

4. According to the 1969 Census of Agriculture, 81.2 percent of the U. S. farm operators reporting residence reported that they lived on the farm premises. The same statistic for census years prior to 1969 is reported as follows:

Year	*Percent*
1964	90.5
1959	92.4
1954	93.8
1950	94.9
1945	94.2
1940	94.6

(Footnote continued on next page.)

OSHA inspector may attempt to exercise discretion to determine whether the residential structure is also subject to inspection, depending in part on whether such structure is a place where work is performed. See 29 U. S. C. 652(5) and 657. By regulation, the Secretary has exempted coverage of domestic household employment. 29 C. F. R. 1975.6. And yet temporary residential housing in labor camps is specifically covered. 29 C. F. R. 1910.142.[5] Clearly, a warrant procedure would substantially promote the privacy and security interests of affected farmers, ranchers and other employers.

Recently, the Court has stressed that the Fourth Amendment protects business premises and corporations. *G. M. Leasing Corporation* v. *United States*, ... U. S. ....., 97 S. Ct. 619. Even more recently, the Court held that Fourth Amendment privacy interests extend to a locked footlocker seized by federal narcotic agents at a railroad station. *United States* v. *Chadwick*, ... U. S. ....., No. 75-1721, decided June 21, 1977.

As stated in the dissenting opinion in *Frank* v. *State of Maryland*, 359 U. S. 360 at 382:

> "We live in an era 'when politically controlled officials have grown powerful through an ever increasing series of minor infractions of civil liberties [cite omitted].' One invasion of privacy by an official of government can be as oppressive as another. Health inspections are important. But they are hardly more important than the search for narcotic peddlers, rapists, kidnappers, murderers, and other criminal elements."

(Footnote continued from preceding page.)
The number of farm operators is considered in the census to be the same as the number of farms. U. S. Dept. of Commerce, Social and Economic Statistics Administration, Bureau of the Census, 1969 Census of Agriculture, Chapter 3, Vol. II, Part 3, pp. 170-174.

5. 29 C. F. R. 1975.4(b)(2) provides:

> "Any person engaged in an agricultural activity employing one or more employees comes within the definition of an employer under the Act, and therefore, is covered by its provisions. However, members of the immediate family of the farm employer are not regarded as employees for the purposes of this definition."

To protect Fourth Amendment rights against arbitrary government intrusion, a number of federal courts have held that the Secretary cannot conduct an objected-to inspection under Section 8(a), 29 U. S. C. 657(a), without obtaining a search warrant based on probable cause. *Brennan* v. *Gibson's Products, Inc. of Plano*, 407 F. Supp. 154; *Dunlop* v. *Hertzler Enterprises*, 418 F. Supp. 627; *Usery* v. *Rupp Forge Co.*, N. D. Ohio, No. C-76-385, decided April 22, 1976; and *Usery* v. *Centrif-Air Machine Co.*, 424 F. Supp. 959.

In reliance on *Camara* v. *Municipal Court, supra*, and *See* v. *City of Seattle, supra*, the court in *Gibson's Products, supra*, 407 F. Supp. at 157, stated: "These authorities and others cited below convince us that facially the inspection provisions of OSHA amount to just such an attempt at a broad partial repeal of the fourth amendment as is beyond the powers of Congress. Only a construction of them as enforcible solely by resort to some form of administrative search warrant such as *Camara* contemplates . . . can save these provisions."

In spite of substantial judicial precedent against warrantless OSHA inspections, only the decision of the three-judge court below has recognized that Section 8(a) must be invalidated as unconstitutional.[6]

> "While we adopt, in general, the similar reasoning employed there [*Gibson's Products*], we decline the invitation to judicially redraft an enactment of Congress. Unlike the *Gibson's Products* court, we cannot accept the proposition that the language of the OSHA inspection provisions envision [sic] the requirement that a warrant be obtained before any inspection is undertaken. Certainly, Congress was able, had it wished to do so, to employ language declaring that a warrant must first be obtained, the procedures

6. Warrantless inspections under state occupational safety and health laws similar to Section 8(a) of OSHA have been invalidated as unconstitutional by state courts. See *Alaska Truss & Millwork* v. *State of Alaska*, No. 2903, decided June 2, 1977 (Alaska S. Ct.); and *Yocom* v. *Burnette Tractor Company, Inc.*, No. CA-366-MR, decided May 27, 1977 (Kentucky Court of Appeals).

> under which it is to be obtained, and other necessary regulations. Congress did not do so and we refuse to accept that duty." *Barlow's, Inc.* v. *Usery, supra,* 424 F. Supp. at 441.

The court in *Gibson's Products, supra,* 407 F. Supp. at 163, had substantial reservations in allowing Section 8(a) to stand, recognizing that such an approach is "subject to criticism as remedial to the verge of redrafting." In attempting to justify its failure to strike down the OSHA inspection provision, the court in *Gibson's Products, supra,* 407 F. Supp. at 162, relied on a purported "inspection warrant" requirement in the OSHA Compliance Operations Manual[7] and referred to the phrase "compulsory process" in the Secretary's regulations. See 29 C. F. R. 1903.4. In spite of such intermediate administrative guidelines, the position of the Secretary in *Gibson's Products, supra,* 407 F. Supp. at 157, and in the case below, is that the language of Section 8(a) permits inspection without obtaining a warrant based on probable cause. In addition to the position of the Secretary, there is no substantial legislative history indicating that Congress intended other than a warrantless inspection system.[8]

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7. The OSHA Compliance Operations Manual (January, 1972), cited in *Brennan* v. *Gibson's Products, Inc. of Plano,* 407 F. Supp. 154, at 156, n. 4, was revised in November, 1975, CCH Employment Safety and Health Guide ¶ 4251 (1976).

8. Senate Report No. 91-1282, 91st Cong., 2d Sess., U. S. Code, Cong. & Admin. News 1970, page 5187, states:

> "In order to carry out an effective national occupational safety and health program, it is necessary for government personnel to have the right of entry in order to ascertain the safety and health conditions and status of compliance of any covered employing establishment. Section 8(a) therefore authorizes the Secretary or his representative, upon presenting appropriate credentials, to enter at reasonable times the premises of any place of employment covered by this act, to inspect and investigate within reasonable limits all pertinent conditions, and also to privately question owners, operators, agents or employees."

Both the actions of the Secretary and the Congressional purpose behind Section 8(a) require that such section be invalidated as unconstitutional. If the words of a statute or its legislative history make it indisputably clear that Congress intended a result that is unconstitutional, the statute must be invalidated. *Buckley* v. *Valeo,* 519 F. 2d 821 at 878, affirmed in part and reversed in part, 424 U. S. 1; *United States* v. *Thompson,* 452 F. 2d 1333 at 1341.

B. The Occupational Safety and Health Act Does Not Constitute the Kind of "Pervasive Regulation" Which Justifies Warrantless Inspections.

As a narrow exception to the warrant requirement, this Court has allowed warrantless administrative searches in instances when such searches were conducted pursuant to a business licensing statute. *United States* v. *Biswell,* 406 U. S. 311; *Colonnade Catering Corp.* v. *United States,* 397 U. S. 72. Both cases, involving the federal regulation of the firearms and liquor industries respectively, permitted warrantless entry in view of the historical regulation of the businesses, the urgent federal interest being furthered, the diminished expectation of privacy, and the difficulty in detecting violations of the law. *United States* v. *Biswell, supra,* 406 U. S. at 315-317.

The judicial guidelines allowing warrantless entry in regulation of firearms and liquor, and again in the regulation of coal mining, *Youghiogheny and Ohio Coal Company* v. *Morton,* 364 F. Supp. 45, are inapplicable to the OSHA regulatory scheme.

OSHA is not a special licensing law with which a businessman must comply as a condition of engaging in business. Therefore, it cannot be said that an employer selected his business knowing full well that he would thereby be subject to warrantless inspections, as was the case with the firearms dealer in *Biswell, supra,* 406 U. S. at 316. See *Brennan* v. *Gibson's Products, Inc. of Plano, supra,* 407 F. Supp. at 159 and 160.

Unlike the federal licensing laws, OSHA regulates every business and every working man and woman.[9] OSHA extends to both hazardous and relatively nonhazardous businesses, regardless of existing state or federal health and safety regulation. OSHA covers small and large employers, many of which have higher privacy expectations than others.

In enacting OSHA, Congress did not provide a regulatory scheme immediately and specifically intended to deal with occupational safety and health hazards of emergency proportions. To the contrary, OSHA is an attempt to codify the preexisting common law duty for an employer to refrain from being negligent. As stated in the Senate Report No. 91-1282, 91st Cong., 2d Sess., U. S. Code, Cong. & Admin. News 1970, page 5186:

> "Under principles of common law, individuals are obliged to refrain from actions which cause harm to others. Courts often refer to this as a general duty to others. Statutes usually increase but sometimes modify this duty. The committee believes that employers are equally bound by this general and common duty to bring no adverse effects to the life and health of their employees throughout the course of their employment. Employers have primary control of the work environment and should insure that it is safe and healthful. Section 5(a), in providing that employers must furnish employment 'which is free from recognized hazards so as to provide safe and healthful working conditions,' merely restates that each employer shall furnish this degree of care."

9. 29 U. S. C. 652(5) defines "employer" as:

> ". . . a person engaged in a business affecting commerce who has employees, but does not include the United States or any State or political subdivision of a State."

29 U. S. C. 652(3) defines "commerce" as:

> ". . . trade, traffic, commerce, transportation, or communication among the several States, or between a State and any place outside thereof, or within the District of Columbia, or a possession of the United States (other than the Trust Territory of the Pacific Islands), or between points in the same State but through a point outside thereof."

Also see 29 C. F. R. 1975.

In addition to the general duty clause, 29 U. S. C. 654(a)(1), referred to in the Senate Report No. 91-1282, *supra*, OSHA imposes on businesses a conglomeration of general occupational safety and health standards, 29 U. S. C. 655(a) and (b), many of which were promulgated by national standards organizations and various industrial and professional groups prior to enactment of OSHA.[10]

Considering the generalized approach for promoting occupational safety and health and the lack of Congressional findings that dangerous and hazardous conditions exist in a majority of the millions of individual businesses regulated, OSHA is visibly not characteristic of the kind of pervasive regulation which justifies a wholesale repeal of the Fourth Amendment.

C. Inspections Without a Search Warrant Are Not Necessary to Avoid Frustrating the Purpose of the Occupational Safety and Health Act.

Although warrantless inspections may be administratively expedient under OSHA, such inspections are not a prerequisite for achieving effective compliance with the law. In the liquor and firearms industries, *United States* v. *Biswell*, *supra*, and *Colonnade Catering Corp.* v. *United States*, *supra*, warrantless inspections were partly justified because of the difficulty in discovering violations which could be readily concealed during the time required to obtain a warrant after initial inspection contact. In contrast, many of the potential violations under OSHA are not easily concealed or corrected. For instance, under housing standards for farm labor, specifications are set forth for size of rooms, construction materials, kitchen equipment, floor elevation, number of water outlets, and water pressure. 29 C. F. R. 1910.142. Under standards for roll-over protective structures, tractors must be provided with special roll-over structures which conform to certain performance re-

10. See Senate Report No. 91-1282, 91st Cong., 2d Sess., U. S. Code, Cong. & Admin. News 1970, page 5182.

quirements. 29 C. F. R. 1928.51(b)(1). In regulating anhydrous ammonia, standards set forth design, construction, location, installation and operation features. 29 C. F. R. 1910.111.

Healthful and safe working conditions are not implemented in 24 or even 48 hours. Such conditions are developed by long-range planning and often involve substantial monetary investment. To help achieve this end, the Small Business Act, 15 U. S. C. 631, *et seq.*, was amended to make loans to small business concerns for the purpose of meeting the requirements of OSHA. 15 U. S. C. 636.[11]

The effectiveness of routine unannounced inspections in achieving compliance with the Act will nevertheless continue even if a search warrant can be demanded by an employer. With or without a warrant requirement, an employer will not necessarily know whether an OSHA inspector has obtained a search warrant prior to initial inspection contact.

Nor does the requirement that a search warrant be obtained prior to inspection obviate Congressional prohibition against advance notice of an OSHA inspection. See 29 U. S. C. 651(10). Advance disclosure of an inspection largely depends on the discretion of the Secretary and his agents. Any person who gives advance notice of an inspection without proper authority may be punished by fine and imprisonment. 29 U. S. C. 666(f).

In spite of the advance notice prohibition in 29 U. S. C. 651(10) and 666(f), the Secretary has already authorized advance notice of inspections in the following situations: (1) In cases of apparent imminent danger, to enable the employer to abate the danger as quickly as possible; (2) in circumstances where the inspection can most effectively be conducted after regular business hours or where special preparations are necessary for an inspection; (3) where necessary to

11. The Small Business Act, 15 U. S. C. 631, *et seq.*, was amended by Pub. L. 93-237 to finance structural, operational and other changes required by OSHA and other federal laws.

assure the presence of representatives of the employer and employees or the appropriate personnel needed to aid in the inspection; and (4) in other circumstances where the Area Director determines that the giving of advance notice would enhance the probability of an effective and thorough inspection. 29 C. F. R. 1903.6.

Other compliance-related provisions of OSHA which are unaffected by a warrant requirement include the employee inspection request provisions whereby an employee may report violations to the Secretary, 29 U. S. C. 657(f)(1) and (2); the employer reporting and posting provisions by which an employer must maintain and post records of occupational illnesses and injuries, 29 U. S. C. 657(c)(1), (2) and (3); and civil and criminal penalty provisions prescribing substantial fines and imprisonment, 29 U. S. C. 666.

Left unchallenged, Section 8(a) of OSHA creates a "roving commission" of OSHA compliance officers with blanket inspection authority beyond reason and necessity. *Brennan* v. *Gibson's Products, Inc. of Plano, supra,* 407 F. Supp. at 162. Inspectors are not currently required under Section 8(a) to conduct investigations based on the likelihood of violations. Such broad discretion results in many needless searches, which will not, in fact, promote the purpose of OSHA. The unfortunate effect is the curtailment of Fourth Amendment rights. As stated by Justice Jackson in the dissenting opinion of *Brinegar* v. *United States,* 338 U. S. 160 at 180: "Among deprivation of rights, [Fourth Amendment rights] none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government."

CONCLUSION.

The judgment of the three-judge district court declaring Section 8(a) of the Occupational Safety and Health Act unconstitutional should be affirmed.

Respectfully submitted,

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